No. 88-393

Supreme Court, U.S.
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In The

Supreme Court of the Unite

October Term, 1988

TEAM, INC. and LEAK REPAIRS, INC.,

Petitioners,

v.

JONATHAN OVERSTREET, KOPPL COMPANY, M. DOUGLAS COKER, AND KOPPL INDUSTRIAL SYSTEMS,

Respondents.

TEAM, INC. and LEAK REPAIRS, INC.,

Petitioners,

v.

JOHN A. EDMON, KOPPL COMPANY M. DOUGLAS COKER, and KOPPL INDUSTRIAL SYSTEMS,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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October, 1988

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

This case comes before the Court on a Petition by Team, Inc. and Leak Repair, Inc., plaintiff-appellant below, for a Writ of Certiorari. At issue is a judgment of the United States Court of Appeals for the Ninth Circuit which affirmed the three summary judgments granted

the Respondents by the United States District Court for the Central District of California. The District Court granted the Respondents' summary judgment by holding that Respondents had not missappropriated any of the Petitioners' trade secrets or interfered with their contractual relations. The opinion of the Ninth Circuit Court of Appeals is unreported according to a note appended thereto which stated, "This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit . . .

STATEMENT OF CASE

In 1984, Respondent Koppl Company, a small 50 year old California company, engaged in the business of working on pipes in oil refineries and chemical plants which contained flowing liquids and gas under pressure, decided to broaden the services they offered to their existing customers by also providing the service of sealing leaks on pipes which are on stream and under pressure (leak sealing). At that time there were two large international companies (one of them the Petitioner) offering leak sealing services worldwide and over ten smaller companies offering the same services on a regional basis in various areas of the United States.

Respondent Koppl, in the course of offering leak sealing to its existing customers, over a period of nine months hired, among others, four employees who previously worked for the Petitioner. Three of those individuals are also Respondents in this matter.

In providing leak sealing to the Respondents' customers, Respondent used the hardware and techniques which were widely used and well known among the many companies engaged in the business of leak sealing. The hardware and techniques were also well known to leak sealing customers. Respondent Koppl had been selling its own leak sealing hardware and sealants since 1982, several years prior to entering the leak sealing service business. The Respondents have produced and used leak sealing techniques, hardware and sealants which were commonly known and used in the industry or were independently researched and developed by Respondents. (See Appendices A, B, C and D of Petitioners' brief).

In response to the Respondents' three summary judgment motions in the District Court, the Petitioners failed to establish the existence of any facts upon which a jury could reasonably conclude that the techniques, hardware, customer list and sealants used by the Respondents were trade secrets.

On June 21, 1988, when the Court of Appeals affirmed the District Court's grant of summary judgment to the Respondents, it did not establish a new standard for summary judgments as alleged by the Petitioners. Petitioners failed their responses to the Respondents' motions to include any material facts which would prove that the Petitioners' alleged trade secrets were in fact secret and were not commonly used by other companies engaged in the leak sealing business. Petitioners further failed to provide the District Court with any material facts which contradicted Respondents' claims that they

independently developed their own methods and customer lists.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari (hereinafter, "Writ") should not be granted, because the decision of the Court of Appeals was consistent with the standard, for Summary Judgment established by the Supreme Court.

1. The Burden.

Petitioners claim that the decision of the Court of Appeals imposes a much higher burden on them than is required under Rule 56 of the Federal Rules of Civil Procedure. (Writ, page 11).

However, Respondents submit, the Petitioners have made the error of considering only paragraph (c) of Rule 56, while ignoring paragraph (e) of Rule 56.

Thus, the combined effect of paragraph (c) *and* paragraph (e) of Rule 56 is to focus attention on the particular burden of proof that the non-moving party must bear at trial as to an element essential to its case.

Therefore, Petitioners have erred in their contention that the Court of Appeal imposed "a much higher burden" by requiring them to establish the existence of facts on an issue prior to trial (Writ, page 5).

The burden obliges the Petitioners to do more than "merely present evidence of a factual dispute."

The arguments of the Respondents are supported by three recent rulings by the Supreme Court which clarify the Summary of Judgment issue and which indicate that the Court has clearly decided not to take a harsh view toward motions for summary judgment.

The decisions in *Celotex Corp. v Catrett*, 477 U. S. 317 (1986); *Matsushita Elec. Indus. Co. v Zenith Radio Corp.*, 475 U. S. 574 (1986), and *Anderson v Liberty Lobby, Inc.*, 477 U. S. 242 (1986), as explained and supported by subsequent decisions, illustrate that the arguments of Petitioners are simply wrong, and there is no reason for the Supreme Court to grant this Petition.

2. The Evidentiary Standard.

In addition, the allegation of Petitioners (Writ, page 5) that the Supreme Court has only addressed actions in which the movant presents no evidence to support the motion (citing *Celotex*) is misleading and taken out of context.

The Supreme Court actually stated: "There is no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim." *Celotex*, at page 323 (emphasis in original). This was cited in *Edwards v Aguillard*, 482 U.S. ___, 96 L. Ed. 2d 510, 527 (1987).

The Supreme Court in *Celotex* said (at page 323) that the motion for summary judgment "may, and should, be granted," regardless of whether the moving party accompanies its motion with affidavits, "so long as whatever is

before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c) is satisfied." The Respondents did in fact submit an abundance of affidavits and other documentary evidence with each of their three summary judgment motions. Therefore the Petitioners' discussion of this issue is superfluous and is an attempt to confuse the issues. Petitioners also seem to be attacking the decisions in *Matsushita* and *Anderson*, by claiming that in those cases "the evidentiary standard exceeds the ordinary preponderance requirement." (Writ, page 5).

This is curious, in view of the fact that those cases were decided by the Supreme Court, the very Court to which the Petitioners are now requesting to review this case. Yet their attacks are limited to the Court of Appeal, and nowhere in the body of the Petition is there a request to the Supreme Court to reverse itself on the decisions in *Matsushita* and *Anderson*. Indeed, much reliance is placed throughout the Writ on *Anderson*, although the Petitioners have intentionally given an erroneous interpretation to attempt favoring their convoluted arguments.

3. No Jury Trial.

In addition, Petitioners are not entitled to a jury trial merely by inferring that they should have one. They failed in their response to the Respondents' summary judgment motions to provide the court with sufficient evidence for the court to send the case to a jury.

ARGUMENTS

I

PETITIONERS HAVE ERRED IN THEIR ANALYSIS OF THE LAW ON SUMMARY JUDGMENT.

1. The Burden.

The Petitioners have made the error of considering only paragraph (c) of Rule 56 (Writ, page 6), while ignoring paragraph (e) of Rule 56.

In reality, the Petitioners have erred in alleging that the non-moving party, in order to show a genuine issue, merely has the burden of submitting *any* evidence "showing the possibility of the existence of certain facts from which it would be open to a jury to infer from the circumstances that the complained-of wrong occurred." (Writ, page 6).

In actual fact, the Supreme Court in *Anderson* said (at pages 247-248) that "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for the summary judgment; the requirement is that there be no *genuine* issue of *material* fact (emphasis in original).

It has been said that in so holding, the Supreme Court indicated that the burden upon the moving party is not necessarily one of producing evidence showing the absence of a genuine issue of material fact. Instead, the burden may be discharged by "showing" – that is, "pointing out to the district court" – that there is an absence of evidence to support the non-moving party's case. *Cal-Farm Insurance Co. v United States*, 647 F. Supp. 1083 (E.D. Cal. 1986).

The Respondents clearly showed the District Court that the Petitioners were unable to show their alleged trade secrets were in fact secret.

The Court in *Celotex* continued (at page 248) that the question was whether the evidence was such that a reasonable jury could return a verdict for the non-moving party, and it noted Rule 56(e)'s provision that a party opposing a properly supported motion for summary judgment " 'may not rest upon the mere allegations or denials of his pleading, but . . . must set forth *specific facts* showing that there is a genuine issue for trial.' " (Emphasis added).

The Court reaffirmed this principle in *Matsushita* (at page 552).

The District Court and the Court of Appeals found that the Petitioners failed to set forth specific facts showing that trade secrets even existed. They were unable to show that the techniques, hardware, sealants and customer lists which were at issue were not known to the many other companies in the industry. In fact, the Petitioners even stated that they do not know the techniques and hardware used by their competitors. (Court of Appeals record Tab [hereinafter "Tab"] 104, p.263, p.267, p.270).

Thus, the combined effect of paragraph (c) *and* paragraph (e) of Rule 56 (together with the Supreme Court's interpretation) is to focus attention on the particular burden of proof that the non-moving party must bear in a summary judgment motion as to an element essential to its case.

2. The Evidentiary Standard.

The Court in *Anderson* said (at page 249) that there was *no* issue for trial *unless* there was sufficient evidence favoring the non-moving party for a jury to return a verdict for that party (emphasis added).

If the evidence was merely colorable, or was not significantly probative, then summary judgment would be granted. *Anderson,* at pages 249-250.

Petitioners complain (Writ, pages 4-5) that the decision of the Court of Appeal requires a plaintiff whose claim is attacked by a motion for summary judgment to convince the trial court judge of the claims presented. However, the Court in *Anderson,* citing *Improvement Co. v Munson,* 14 Wall 442, 448 (1872), stated as follows (at page 251):

> "Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that if there was what is called a scintilla of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of this court have established a more reasonable rule, that *in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally not evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed."* (Emphasis added).

The Court held that whether the case should even be presented to a jury was guided by the substantive evidentiary standards that applied to the case (at page 255).

The Respondents are not arguing that the judge should engage in credibility determinations or weigh the evidence; and the Petitioners make the mistake of basing their Writ on the argument that the trial judge did that.

In actual fact, the trial Judge was doing no more than that prescribed under Rule 56 and the decisions in *Anderson, Matsushita,* and *Celotex*. The District Court's inquiry was whether the evidence presented a sufficient disagreement to require submission to a jury or whether the Respondents had to prevail on the evidence as a matter of law.

In the present case, the District Court and the Court of Appeals held that the Petitioners had failed to come forward with sufficiently "specific" facts from which to draw reasonable inferences about any material facts of actual and real secrecy which is a necessary element of the claim of the Petitioners.

In *T.W. Elec. Service v Pacific Elec. Contractors,* 809 F.2d 626, 631, f.n.3 (9th Cir.1987) the Court stated that if the statements of the Supreme Court in *Anderson* were construed as requiring a Court to ask whether a jury could find in favor of the non-moving party viewing *all* of the evidence – that presented by both sides – (as Petitioners seem to want the Court to do in the present case) then it would contradict the clear instruction that a Court may not weigh the evidence or assess its credibility.

The Petitioners have avoided the cases of *Celotex* and *Matsushita*. A review of these decisions further bolsters the arguments of Respondents in this case.

In *Matsushita* (at page 538), it was held that whether a genuine issue can be said to exist with respect to a material fact is often a close question. Clearly, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." The Petitioners also failed this test.

Celotex (at page 265) stands for the proposition that if the party moving for summary judgment meets its initial burden of identifying for the Court the portions of the material on file that it believes demonstrates the absence of any genuine issue of material fact, the non-moving party may not rely on the mere allegations in the pleadings in order to preclude summary judgment. Instead, the non-moving party has to set forth specific facts under Rule 56, showing there is a genuine issue for trial. That principle was followed in *Brewer For Brewer v City of El Cerrito*, 666 F.Supp.1346, 1349 (N.D.Cal.1987). The Petitioners also failed this additional test.

In *T.W. Elec. Service v Pacific Elec. Contractors*, 809 F.2d 626, 630 (9th Cir.1987), the Court of Appeal, citing the above propositions, said that the non-moving party may not merely state that it will discredit the moving party's evidence at trial and proceed in the hope that something can be developed at trial in the way of evidence to support its claim.

3. No Right to a Jury Trial.

Petitioners argue that summary judgment impermissibly infringes their right to a jury trial (Writ, page 19), and cite the case of *Poller v Columbia Broadcasting Systems, Inc.*, 368 U.S. 464, 467 (1962).

However, *Poller* is distinguished from the present case. In *American Floral Serv. v Florists' Transworld Del.*, 633 F. Supp. 201, 227 (N.D. Ill. 1986), the Court said that *Poller* advised sparing use of summary judgment in anti-trust cases. "But that advice simply reflects the usual factual complexity of anti-trust cases, a situation always calling for caution in summary judgment analysis."

The Court stated: "Now *Matsushita Electric Industrial Co. v Zenith Radio Corp.* (citations) makes plain the *Poller* caveat is only that and not an inexorable mandate." The Court, after discussing *Matsushita,* and *discrediting* the notion that a non-moving party may draw inferences favorable to their contentions and assert that they have thereby presented issues that must be resolved by a jury, stated (at page 227) that "*Poller* merely teaches caution" (citation), and "if there is no genuine issue of material fact, and if the resisting party does not present a record sufficient to support a reasonable finding in his favor, a district court has a duty to grant the motion of summary judgment." (citation).

Respondents submit, in a case such as the present case, where the issues are not as complex as those in an anti-trust suit, *Poller* has very little significance. Moreover, the Petitioners cannot merely draw an inference that they are entitled to a jury trial, especially when their claimed trade secrets are not trade secrets at all, and both the District Court and Court of Appeals recognized that there could not be a reasonable finding in Petitioners favor based on the affidavits and other insignificant documentary evidence they filed with the District Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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